IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. .....

SOMA PETO,

Petitioner,

vs.

THOMAS HOWELL,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit was filed January 29, 1941, and is reported in 117 Fed. (2nd) 249; also in Record, pages 241-247.

The opinion of the Circuit Court of Appeals, on the first appeal to that court, is reported in 101 Fed. 2nd 353.

The District Court did not file a written opinion, the Judgments entered by it being in the Record, pages 219, 221.

JURISDICTION.

(Note Petition (*supra*, p. 4).)

STATEMENT OF THE CASE.

Petitioner entered the grain business in 1910 in Liverpool, England, and since that time has been continuously engaged in that business (R. 74, 162). After coming to the United States, he was employed by Rosenbaum Grain Corporation, and since 1916 he has been a grain merchant in Kansas City, Mo. In 1927 he became and still is associated with B. C. Christopher & Co., of Kansas City, Mo., a large grain house which was and still is a member of various exchanges, including the Chicago and Kansas City Boards of Trade (R. 74-75).

Petitioner bought, sold, stored and shipped all kinds of grain in United States and Canada. He operated and still operates grain elevators in the Middle West and deals in "futures" and "cash" grain (R. 75). In 1931, at time of respondent's "corner", petitioner was a member of the Kansas City Board of Trade.

Thomas Howell, respondent, in 1931 was a large grain operator. Through use of various "dummy" accounts, through falsification of reports to the Grain Futures Administration (R. 48), he was able to acquire approximately 8,000,000 bushels of July 1931 corn and thereby "corner" the July 1931 corn market on the Chicago Board of Trade.

Petitioner's Trades.

The petitioner testified that in 1931 he had two accounts with B. C. Christopher & Company through which he bought, sold, shipped and stored grains of all kinds (R. 75-76). One was a personal account in which he alone was interested, and the other was called a joint account because B. C. Christopher & Company shared in its net profits. However, he, alone made every trade in both ac-

counts, and was the sole arbiter of all trades made (R. 76). In his personal account, B. C. Christopher & Company had no interest whatsoever. *In 1931, at the time of the trades here involved, he owned and operated in his personal account a grain elevator in Dellvale, Kansas, which he used for the purpose of buying, storing and shipping grain* (R. 76).*

The petitioner stated that his net worth in 1931 was approximately $45,000.00 (R. 82; 85). His income in 1931 was between $20,000.00 and $30,000.00 (R. 184); that he had use and facilities for handling the grain which he purchased and the financial ability to carry his trades (R. 74, 75).

On April 17, 1931, petitioner sold 5,000 bushels of Chicago July corn futures (Ex. 149; R. 82), and on May 12, 1931, he sold 45,000 bushels (Ex. 150; R. 83). At the close of business on May 12, 1931, he was therefore short 50,000 bushels. On May 22, 1931, he purchased 5,000 bushels of the same future, and on July 23rd, he purchased an additional 10,000 bushels, so that after these trades and from the close of trading on July 23, 1931, petitioner was short 35,000 bushels in said future (R. 76, 81; Ex. 149, 153; R. 82-84).

Petitioner further testified that when he made these trades, he did not know the respondent or that respondent was operating in the market (R. 80); that the first intimation that petitioner had that something was wrong was the unusual rise in the price of Chicago July corn futures on July 29, 1931, when the price rose 9¾ cents per bushel (R. 79).

Petitioner testified that the reasonable value on July 31st of Chicago July corn futures at Chicago was 50 to 52 cents per bushel R. 81). He claimed a loss on the difference between the price at which he bought Chicago July

*All italics ours, unless otherwise indicated.

corn on July 31st, 1931, at 71⅜ cents per bushel and the price at which he could have bought Chicago July corn at 47¼ cents per bushel had the market not been "cornered," or a difference of 24⅛ cents per bushel on 35,000 bushels amounting to $8,433.75.

Respondent's Defense and the Evidence Relating Thereto.

The respondent pleaded that he was not guilty of monopolizing or attempting to monopolize the trade in corn and that the trades of the petitioner were gambling transactions.

As to the issue of monopoly, the evidence at the last trial concerning the respondent's purchases, sales and withholding of corn from the Chicago July 1931 corn market is exactly the same as was presented in the first trial and upon which issue this Court has already rendered its opinion. (See *Peto* v. *Howell*, 101 Fed. (2d) 353.)

The evidence presented by respondent to prove his affirmative defense of gamling was solely inferential—based on the showing that petitioner, instead of making physical delivery of the corn sold, closed out his trades by offsetting purchases.

The evidence as to B. C. Christopher & Company disclosed that it was and still is a large grain house in Kansas City, Mo., and is a member of the Chicago and Kansas City Boards of Trade (R. 184-85; 75); that it buys wheat, corn, barley, oats and other grains; that it receives consignments from country shippers and handles grain for others (R. 184); that it owns elevators; that it stores grain in warehouses in Kansas City, Wichita, Salina, Topeka, Hutchinson and other southwestern terminals (R. 185); that there is no part of the cash grain business in which it does not engage (R. 186); whenever B. C. Christopher & Co. takes an order for a future trade that trade is confirmed to the customer on a confirmation that the terms

of the contract are that delivery is contemplated (R. 185, 186). This applied to petitioner's transactions with B. C. Christopher & Co. in his personal account (R. 186).

The evidence in respect to the joint account corroborated that given by petitioner. Mr. B. C. Christopher, Jr. testified that petitioner was not a partner of the firm but had a half interest in the joint account (R. 135); that in respect to said account, petitioner made all the transactions without consulting anyone; that they relied entirely on his judgment (R. 135); that the joint account was maintained to merchandise grain (R. 138); that through said account, grain was sold to dealers, processors and feeders throughout the country; that all the cash grain purchased in said account was immediately hedged in the futures market (R. 138).

Mr. B. C. Christopher, Jr. further corroborated petitioner's testimony by testifying that he knew petitioner bought and sold actual corn in his personal account (R. 139); that petitioner owned and operated an elevator in Dellvale, Kansas, in his personal account in 1931 (R. 139); that insofar as petitioner was concerned, in his personal account he was treated the same as any other customer of theirs (R. 136; 139-140).

In respect to petitioner's trade on which suit is brought, the evidence showed that the same were all in the personal account of petitioner and were treated the same by B. C. Christopher & Co. as those made for any other customer (R. 136, 139, 190): that the firm had an interest in petitioner's personal trades only insofar as he was a customer of the firm (R. 139); that they did not know of the particular transactions petitioner made in 1931 (R. 186) any more than they did of any other customer of the firm. The evidence was that when a customer placed an order with B. C. Christopher & Co., they gave it to Lamson Bros., a large Chicago grain house, who have a representative in Kansas City (R. 134-135). All trades given to Lamson

Bros. by B. C. Christopher & Co. for execution are carried by Lamson Bros. as the trades of B. C. Christopher & Co. (R. 135). The name of the customer for whom B. C. Christopher & Co. is handling the trade is not given to Lamson Bros., who know only B. C. Christopher & Co. (R. 117, 135).

After the verdict in favor of the respondent was returned at the last trial, the petitioner made motions in the alternative, pursuant to Rule 50 B of the Federal Rules of Civil Procedure, to have the verdict of the jury set aside and judgment entered for petitioner in accordance with his motion for a directed verdict or for a new trial (R. 214-218). These motions were overruled and judgment entered in favor of respondent from which petitioner appealed. The Circuit Court of Appeals affirmed the judgment of the District Court.

SPECIFICATION OF ERRORS.

The errors which petitioner will urge if the writ of certiorari is issued is that the Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that respondent had presented substantial evidence from which a jury could find that the transactions of the petitioner and his broker constituted gambling under Illinois Revised Statutes 1939, Chapter 38, Section 328.

2. In holding that the petitioner and his broker were gambling in violation of Illinois Revised Statutes 1939, Chapter 38, Section 328.

3. In holding that the "P" and "S" slips used by petitioner's broker, the manner and method in which they kept their records and their reference to their futures department as the "option department" is evidence of an intent on their part to gamble.

4. In holding that petitioner had no elevator facilities in which to store grain; that he was financially unable to carry trades; and that he did not deliver grain except in a few instances.

5. In failing to follow the Illinois Law construing the statute aforesaid on gambling as expounded in *Ehrlich* v. *Rothschild*, 11 N. E. (2nd) 623; 292 Ill. App. 511; and *Riordon* v. *McCabe*, 341 Ill. 506; 173 N. E. 660.

6. In failing to follow the law of other Circuits on the question of what constitutes substantial evidence of an intent to gamble.

7. In affirming on the 29th day of January, 1941, the Judgment of the District Court.

SUMMARY OF ARGUMENTS.

I.

UNDER THE ILLINOIS LAW IN ORDER THAT THE TRANSACTIONS BETWEEN PETITIONER AND B. C. CHRISTOPHER & COMPANY SHALL CONSTITUTE GAMBLING, THERE MUST BE AN AFFIRMATIVE INTENT BY BOTH PARTIES NOT TO DELIVER THE COMMODITIES, BUT TO SETTLE ON DIFFERENCES ONLY WHICH INTENTION MUST BE MUTUAL AND DISCLOSED.

II.

A.

PETITIONER'S TRANSACTIONS ARE PRESUMED TO BE LEGAL AND THE BURDEN OF PROVING THEM TO BE GAMBLING CONTRACTS RESTS UPON RESPONDENT WHO MUST PROVE THEIR ILLEGALITY BY SUBSTANTIAL EVIDENCE.

B.

THE FACT THAT MOST OF PETITIONER'S FUTURES TRADES WERE CLOSED OUT BY OFFSETTING PURCHASES IS NOT SUBSTANTIAL EVIDENCE OF AN INTENTION ON THE PART OF B. C. CHRISTOPHER & COMPANY OR PETITIONER TO GAMBLE.

III.

A.

RESPONDENT FAILED TO INTRODUCE ANY SUBSTANTIAL EVIDENCE THAT B. C. CHRISTOPHER & CO. INTENDED TO GAMBLE. ON THE CONTRARY THE EVIDENCE AFFIRMATIVELY SHOWED THEIR INTENTION NOT TO GAMBLE.

B.

RESPONDENT FAILED TO INTRODUCE ANY SUBSTANTIAL EVIDENCE THAT PETITIONER, HIMSELF, INTENDED TO GAMBLE. ALL THE EVIDENCE BEARING ON THE QUESTION OF HIS INTENT AFFIRMATIVELY SHOWED THAT HE DID NOT INTEND TO GAMBLE.

IV.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE "P" AND "S" SLIPS USED BY PETITIONER'S BROKER, THE MANNER AND METHOD IN WHICH THEY KEPT THEIR RECORDS AND THEIR REFERENCE TO THEIR FUTURES DEPARTMENT AS THE "OPTION DEPARTMENT" IS EVIDENCE OF AN INTENT ON THEIR PART TO GAMBLE.

ARGUMENT.

I.

UNDER THE ILLINOIS LAW IN ORDER THAT THE TRANSACTIONS BETWEEN PETITIONER AND B. C. CHRISTOPHER & COMPANY SHALL CONSTITUTE GAMBLING, THERE MUST BE AN AFFIRMATIVE INTENT BY BOTH PARTIES NOT TO DELIVER THE COMMODITIES, BUT TO SETTLE ON DIFFERENCES ONLY WHICH INTENTION MUST BE MUTUAL AND DISCLOSED.

The decision of the Circuit Court of Appeals is directly contrary to the decision of the Illinois Courts in respect to what constitutes gambling between broker and customer under the Illinois Statute. Moreover, it is contrary to the decisions of other Circuits on the question as to what constitutes such substantial evidence of gambling on supervised exchanges as to warrant submitting that issue to a jury.

Since the Chicago Board of Trade is the largest grain exchange in the world and approximately 90% of all trades in grain in the United States are executed thereon, the decicision of what constitutes gambling under the Illinois law on such a Board is of national importance in view of the fact that the Illinois law governs such transactions. See *Hoyt* v. *Wickham*, 25 Fed. (2nd) 777, 779; *Lyons Milling Co.* v. *Goffe and Carkener, Inc.*, 46 Fed. (2nd) 241, 245.

The Illinois Statute on gambling is Chap. 38, Sec. 328, (Ill. Rev. Stat. 1939) which provides:

> "Whoever contracts to have or give himself or another the option to sell or buy, at a future time, any grain, * * * where it is at the time of making such contract intended by both parties thereto that the option, whenever exercised, or the contract resulting

> therefrom, shall be settled, not by the receipt or delivery of such property, but by the payment only of differences in prices thereof, * * * or corners the market * * * shall be fined * * * and all contracts made in violation of this section shall be considered gambling contracts, and shall be void."

The two most recent leading cases in Illinois construing this Statute are *Ehrlich* v. *Rothschild*, 11 N. E. (2d) 623; 292 Ill. App. 511 and *Riordon* v. *McCabe*, 341 Ill. 506; 173 N. E. 660. The Court said at page 663 of the last mentioned case:

> "* * * In order to constitute transactions gambling, *both parties* must intend or understand that settlement shall be had, not by receipt or delivery of such commodity but by payment, *only*, of the differences in the price thereof, * * *."

The latest pronouncement of the Illinois law on the construction of the statute under which respondent contends petitioner's transactions were gambles, is the case of *Ehrlich* v. *Rothschild*, 11 N. E. (2d) 623; 292 Ill. App. 511, *where the sole question involved was the same as is involved in this case*, namely, whether the party contending the grain contracts were gambling "produced sufficient evidence to warrant submission of the cause to the jury."

In the Ehrlich case, at page 628, the Court said:

> "* * * In order that the agreement between the broker and his customer shall constitute gambling under the statute, there must be an *affirmative* intent by the parties not to deliver commodities or securities but to settle on differences only. *The intention must be mutual and be disclosed;* * * *."

and at page 627, the Court stated:

> "Any circumstances tending to show the real intention of both parties is admissible, but it is not sufficient to present evidence tending to show the intention of only one of them. It requires two guilty minds to make a contract in violation of the statute. * * *"

In the "Restatement of Contracts" cited extensively and relied upon by the Court in the Ehrlich case, the authors state at Chapter 18, Section 523, page 1014:

> "Sec. 523. BARGAIN TO SETTLE FOR DIFFERENCES IN MARKET PRICES. 1. A bargain purporting to be for the purchase and sale is a wager *if it is part of the bargain* that no actual delivery of the subject matter shall be made and that settlement between the parties shall be made on the basis of differences in market prices. *But an undisclosed intention of one or both parties to a bargain does not invalidate it.*"

By the way of example, the authors of "Restatement of Contracts," Chapter 18, Section 523, at page 1016, illustrate their text as follows:

> "(Illustration.) 3. A, a stock broker, receives and accepts from B an order to purchase 100 shares of stock. B deposits a margin to secure the account. B does not expect to take delivery of the shares; he has dealt with A before and has then settled his account by payment of the difference between the market price at the time of settlement and at the time of the original transaction; and he expects to do so again. *A also expects this, but makes no agreement to this effect.* The bargain between A and B for purchase and sale is not a wager; nor would it be if B, unknown to A, erroneously supposed that A agreed to settle by payment of differences."

See also "Illinois Annotations" to the Restatement of Contracts, Sec. 523, page 274.

As pointed out by the illustration, even if the broker *knows* of the customer's intention to gamble *"but makes no agreement to this effect,"* the transaction is legal.

In *Hoyt* v. *Wickham,* 25 Fed. (2d) 777, at p. 779, the Court said:

> "The fact that a customer does not intend to receive or deliver the actual commodity bought or sold does not make his trades gambling transactions if his intention in that respect is not disclosed to the brokers.

Browne v. *Thorn*, 272 Fed. 950; affirmed 260 U. S. 137; *Mullinix* v. *Hubbard*, 6 Fed. (2d) 109; *Lamson Bros.* v. *Mensen*, 187 Iowa 972-975 * * *. The Illinois cases are all to the same effect."

Petitioner contends that *Ehrlich* v. *Rothschild*, 11 N. E. (2d) 623, 292 Ill. App. 511, is directly in point on the question of what the Illinois Law is and shows conclusively under the facts in the instant case that there was not sufficient evidence to warrant the submission of the issue of gambling to a jury. The Circuit Court of Appeals entirely disregarded this latest pronouncement of the Illinois Law on this point.

II.

A.

PETITIONER'S TRANSACTIONS ARE PRESUMED TO BE LEGAL AND THE BURDEN OF PROVING THEM TO BE GAMBLING CONTRACTS RESTS UPON RESPONDENT WHO MUST PROVE THEIR ILLEGALITY BY SUBSTANTIAL EVIDENCE.

It must be borne in mind that it did not devolve upon petitioner to prove the legality of his contracts. Gambling is an affirmative defense and necessitated proof by respondent that both the petitioner and his broker intended at the time the contracts were entered into that they be settled only by payment of market differences and that such intention was mutual and disclosed.

In *Clews* v. *Jamieson*, 21 Sup. Ct. 845, 182 U. S. 461, at 490, the Court, in construing the Illinois Statute on Gambling, stated:

> "A contract which is on its face one of sale with a provision for future delivery, being valid, the burden of proving that it is invalid, as being a mere cover for the settlement of 'differences,' rests with the party making the assertion. * * *"

See also *Irwin* v. *Williar*, 4 Sup. Ct. 160; 110 U. S. 499 at 507; *Johnson* v. *Milmine*, 150 Ill. App. 208, 222, 223.

In order that the presumption of legality be overcome, nothing less than substantial evidence will avail.

In *Dustin Grain Co.* v. *M'Allister,* 296 Fed. 611, at page 613, the following language was used:

> "* * * And when, at the close of the evidence, there is no substantial evidence to sustain a finding or verdict for the defendant upon a decisive issue in a case, the trial court should instruct the jury to find that issue for the plaintiff."

See also *Ponder* v. *Jerome Hill Cotton Co.,* 100 F. 373 at 377 and *Gettys* v. *Newburger,* 272 F. 209 at 219-220.

A bit of evidence, or some evidence, upon which a jury might have found the issue in favor of defendant is not enough.

B.

THE FACT THAT MOST OF PETITIONER'S FUTURES TRADES WERE CLOSED OUT BY OFFSETTING PURCHASES IS NOT SUBSTANTIAL EVIDENCE OF AN INTENTION ON THE PART OF B. C. CHRISTOPHER & COMPANY OR PETITIONER TO GAMBLE.

Respondent urged most strongly and the Circuit Court of Appeals accepted as evidence of an intent to gamble the fact that most of the "future" transactions between petitioner and his broker, B. C. Christopher & Company, were closed out before the time for delivery by offsetting purchases rather than by the actual physical delivery of the grains dealt in. But this argument is entirely without merit; for the fact that few or no deliveries are made on future trades by millers, processors or those in the grain business does not constitute substantial evidence of an intent to gamble.

The leading case, *Board of Trade* v. *Christie,* 198 U. S. 236, which holds at page 248 that "setoff has all the effects of delivery," while referring to dealings between members of the Exchange, was soon applied by the courts to include

dealings between customer and broker. See *Browne* v. *Thorne,* 260 U. S. 137; *Cleage* v. *Laidley,* 149 Fed. 346; *Mullinix* v. *Hubbard,* 6 Fed. (2d) 109; *Gettys* v. *Newburger,* 272 Fed. 209.

The great and ever increasing influence of the future trading market of the Chicago Board of Trade on our entire agricultural marketing processes was recognized by the courts which began to take a more realistic attitude toward Exchanges and which refused to consider the economic functions performed by the Exchange in an "intellectual vacuum."

It is well known that those in the grain business who hedge in the futures market the actual grain they deal in seldom, if ever, make or receive physical delivery on their future trades but close them out by offsetting purchases or sales, as soon as the actual grain is disposed of.

As stated in "Commodity Exchanges" by Baer & Woodruff (1929 Edition), at page 95:

> "Futures which are bought or sold as hedges are covered in the vast majority of cases by an offsetting futures sales or purchase. *Delivery is exceptional.* This is a normal condition and in line with the purpose of a hedge."

In the Report of the Chief of the Commodities Exchange Administration, 1939, to the Secretary of Agriculture, dated September 25, 1939, in Table 11, on page 10, it is shown that those who engage in hedging are generally short. In Table 14 on page 12, it shows that during the year 1939, out of total future trading in corn on the Chicago Board of Trade amounting to 1,450,607,000 bushels, only 1.8% were settled by delivery. The Chief of the Commodities Exchange Administration states in this Report, on page 12:

> "This very small percentage of future contracts settled by delivery of the actual commodity does not indicate that future contracts are not related to the actual commodities. * * * *It is to the advantage of*

> *the grain producer, dealer, and processor that futures contracts can be closed out by offset. * * * In the larger futures markets it is only when manipulation, squeezes, or congestion make delivery difficult that any considerable percentage of futures contracts are settled by delivery."*

In "Legal Status of Trading in Futures," 32 Ill. Law Review 155, H. S. Irwin, of the Commodities Exchange Administration, states at page 156:

> "* * *. In fact, delivery upon contracts has come to be a very minor function in the more highly evolved types of futures trading, * * *. *Thus, the making of a futures contract to buy or sell upon an organized exchange is very different from the making of a private contract in which it is stipulated that delivery will not be made or required. On an organized market, a definite act is required on the part of the holder of a contract if he wishes to avoid the making of delivery on that contract."*

That delivery is, in fact, seldom made is evidenced by the fact that less than 2% of all future trading on the Chicago Board of Trade running into billions of bushels yearly are settled by actual physical delivery.

In *Gettys* v. *Newburger*, 272 Fed. 209, at pages 219, 220, also based on the Christie case, the Court said:

> "The fact that much the larger portion or all of the dealings of the plaintiff or of the defendant or of the dealings on the New York Cotton Exchange were or are settled and discharged without delivery or receipt of any property *does not constitute substantial evidence* to prove what portion of them was tainted with the pernicious intention and what portion of them was not so tainted * * *."

In *Hoyt* v. *Wickham*, 25 Fed. (2nd) 777, at page 779, the Court said:

> "The court suggested that in its opinion the burden was upon defendant to prove that the transactions were gambling contracts, and that defendant had failed

to carry this burden. Defendant's evidence was to the effect that when, for example, he bought corn for September delivery, he sold an equal amount for September delivery before the 1st of September. He says:

'I did that to close the deal. By selling a future against it they couldn't deliver any grain to me. And the reason they couldn't deliver any was because when I bought a certain amount I sold exactly the same amount before the date for delivery arrived. I sold against it to close the deal out.'

"*In other words, that it was never his intention to deliver or receive any of the grain involved in these transactions. This falls far short* of establishing the existence of a gambling contract, whether under the law of Iowa, *Illinois*, in federal jurisdictions generally or the provisions of the Grain Futures Act * * *."

As the Court said in *Cleage* v. *Laidley*, (based on the Christie case) 149 F. 346, at page 352:

"Nor does the fact that the defendant dealt in 14,000,000 bushels of grain, and that the contracts for more than 98 percent of this property were settled by set-off or by ringing off and by the payment of differences, demonstrate an illegal intention. Since the intention to settle in this way is not unlawful; the fact that contracts were so settled, cannot evidence an illegal purpose * * *."

Not only did the petitioner testify that he intended to make delivery, but so did his broker, the other party to the transaction. The only one who asserted that petitioner's trades were gambles, was the respondent, a third party to the transactions, to escape the consequences of his illegal monopoly.

Finally, the Supreme Court of Illinois, in *Riordon* v. *MaCabe*, 341 Ill. 506, 173 N. E. 660 said at p. 664:

"* * * and there is no legal or moral objection to the purchase or sale of commodities for future delivery even though the parties to the contract intend that if it be to their advantage they will either sell or

> buy for future delivery a sufficient amount of such commodity, so that when one is set off against the other, they shall not suffer loss. * * *"

Thus petitioner has shown that petitioner's contracts are presumptively legal and the burden of proof was upon defendant to show by substantial evidence that both petitioner and his broker intended to gamble with each other and agreed so to do. The fact that petitioner closed out his trades by offsetting contracts instead of making physical delivery is not substantial evidence to prove the contracts illegal.

III.

A.

RESPONDENT FAILED TO INTRODUCE ANY SUBSTANTIAL EVIDENCE THAT B. C. CHRISTOPHER & CO. INTENDED TO GAMBLE. ON THE CONTRARY THE EVIDENCE AFFIRMATIVELY SHOWED THEIR INTENTION NOT TO GAMBLE.

Is there such substantial evidence in the record that petitioner and his broker, B. C. Christopher & Company, intended to gamble, and that such intention was mutual and disclosed so as to warrant the submission of this issue to the jury?

Petitioner contends that far from there being substantial evidence that B. C. Christopher & Co., intended to gamble, the evidence affirmatively shows their intent not to gamble.

To aid in determining with what intent parties deal on Boards of Trade, the Courts have set forth certain indicies.

In *Ehrlich* v. *Rothschild*, 292 Ill. App. 511, 11 N. E. (2d) 623 it was stated at p. 628:

> "* * *; and in considering whether the broker and his customer intended a settlement by payment of differences, the court may consider various circumstances, such as lack of facilities of the buyer to accept delivery of a commodity in the quantities ordered

(citing cases). Also the fact that the customer is not in a business reasonably requiring the purchase or sale of the particular commodity in the particular quantities (citing cases) * * *. Also the previous dealings between the parties (citing cases) * * * or the financial inability of the customer (citing cases) * * *."

As far as any written evidence of intention to deliver, the evidence shows that on every order of sale which petitioner made through B. C. Christopher & Co., it is specifically provided:

> "All transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor * * *. (Ex. 149, 150, 151, 152, 153; R. 82, 84.)

Nowhere in the record did anyone connected with B. C. Christopher & Co., testify of an intent that no delivery should be made. Quite to the Contrary, Mr. James K. Christopher, partner in the firm since 1922, testified that delivery was intended (R. 185, 186).

The evidence shows that B. C. Christopher & Co. accepted and made delivery of grain on futures contracts about every delivery that came along (R. 180). The firm received grain at Chicago in settlement of its futures contracts. The deliveries in such cases were made by warehouse recepits (R. 189). Quite frequently there were deliveries between petitioner and B. C. Christopher & Co., in the joint account, both in Kansas City and in Chicago (R. 189).

Petitioner frequently received and delivered grain in Chicago for the joint account (R. 189). Sworn answers to written interrogatories propounded by the respondent in this case show that both B. C. Christopher & Co. and petitioner were making physical delivery of thousand of bushels of corn and other grain in their joint account, to some of

the largest millers, processors and manufacturers in the country.*

In respect to the financial ability of B. C. Christopher & Company to handle petitioner's trades, respondent who had the burden of proof offered no evidence at all. The evidence shows that B. C. Christopher & Co. was an old established grain and commission house in Kansas City, which had been in business for many years, and held memberships on the Chicago, Kansas City, Hutchison, Salina, Atchison and St. Joseph (Mo.) boards of trades, and also on the St. Louis Mercantile Exchange (R. 162).

The evidence affirmatively shows that B. C. Christopher & Co. stored grain and had access to elevators and warehouses in Kansas City, Wichita, Salina, Topeka, Hutchison and all the Southwestern terminal lines, and that in addition they own one elevator and lease it to petitioner to operate (R. 185).

The evidence discloses that they buy wheat, corn, barley, oats and other grains; that they receive consignments from country shippers and handles grain for others (R. 184); that they own an elevator; that there is no part of the cash grain business in which they do not engage (R. 186). Not only did they have use for the grain but their business is nothing else but dealing in actual grain.

Did B. C. Christopher & Co. know, or should they have known of any illegal intent, if any there was, on the part of petitioner to gamble? There is not one bit of testimony in the record which indicates that they had any knowledge or should have had any knowledge of any intent on the part of petitioner to gamble, even if it were petitioners

* The sworn answers of petitioner to respondent's interrogatories 32 and 34 requesting names of firms, if any, to whom petitioner sold actual corn in 1931 and preceding years lists among others such firms as: Washburn-Crosby; Randolph Milling Co., Purina Mills; Corn Products Refining Co.; Southard Feed Co.; Missouri Poultry Farms; Shreveport Grain Co.; Akard Mills; Bowen-Oglesby Milling Co., and many others. It is significant to note that respondent did not take the depositions of the many firms listed to determine whether petitioner was selling them actual grain as sworn to by him.

intent to do so. They knew that petitioner was a member of the Kansas City Board of Trade and had been since 1926 (R. 185); they knew that he had spent most of his life in the grain business; they knew that he bought and sold grain (R. 135, 1938); they knew that he owned and operated grain elevators (R. 139); *that in 1931, at the time of his trades, he owned and operated in his personal account, a grain elevator in Dellvale, Kansas (R. 135, 184)*; they also knew that in connection with the joint account over which petitioner exercised complete control and was interested with them, they sold grain to hundreds of millers and processors throughout the country.

So far as petitioner's financial condition was concerned, they knew that he had been successful with them and that there had been substantial profits in the joint account from 1926 to 1931 (R. 137); and they knew that in the year 1931, petitioner's net income was from twenty thousand to thirty thousand dollars (R. 184).

If the transactions in this case are held to be gambling, then all trades on the Chicago Board of Trade must be denominated as gambling contracts. As was said by the Supreme Court in *Clews* v. *Jamieson*, 21 Sup. Ct. 845, 182 U. S. 461, at page 488:

> "The view taken by the Circuit Court of Appeals in regard to this case was that the contracts were void as being in violation of the terms of the Illinois Statute which are set forth in the margin. It is a very far-reaching decision, and if followed would invalidate most transactions of every stock exchange in the country 'for the account.' We are unable to agree with the opinion of the Court on this question."

There was certainly no substantial evidence which would warrant the submission of the issue of gambling to the jury. On this ground, alone, the Trial Court erred in overruling petitioner's motion for directed verdict on the issue of gambling. The Circuit Court of Appeals has disregarded the law as set forth in *Ehrlich* v. *Rothschild*, 11

N. E. (2d) 623; 292 Ill. 353 and the Federal cases above cited and erred in affirming the judgment of the District Court.

B.

RESPONDENT FAILED TO INTRODUCE ANY SUBSTANTIAL EVIDENCE THAT PETITIONER, HIMSELF, INTENDED TO GAMBLE. ALL THE EVIDENCE BEARING ON THE QUESTION OF HIS INTENT AFFIRMATIVELY SHOWED THAT HE DID NOT INTEND TO GAMBLE.

Petitioner contends that inasmuch as B. C. Christopher & Co. did not intend to gamble, a discussion as to petitioner's intent is superfluous as having no bearing on the ultimate question of the propriety of the trial court's ruling on the motion for directed verdict.

However, the evidence with regard to petitioner's intent is so clear and convincing that he did not intend to gamble, that petitioner eagerly takes up the question of his intention.

The attention of the Court is first directed to the matter of the financial ability of petitioner to handle his transactions. In 1931, he owned an elevator outright (R. 135). His membership on the Kansas City Board of Trade was worth $12,000.00 (R. 84) and his home was valued at $10,000.00 (R. 85). He had a credit on the books of B. C. Christopher & Co. for $8319.43 (Respondent's Ex. 3, R. 152), on the day he made his largest sale of 45,000 bushels of corn, namely, May 12, 1931. He also had $4,500.00 in cash in the First National Bank of Kansas City and $3,000.00 in stocks and bonds. At the time that his original sales were made in 1931, petitioner was worth about $45,000.00 and owed nothing (R. 82). Petitioner's transactions with B. C. Christopher & Co. had been successful, and every year, from 1926 to 1931, without exception, there had been substantial profits, part of which he withdrew, and part of which he left to his credit (R. 137, 139). His net income in 1931 was between $20,000.00 and $30,000.00 (R. 184). None of

his trades were ever closed out against his will (R. 137, 190).

Petitioner now turns to the question of his facilities to handle the corn. He owned, in his personal account, aside from the elevator he leased in his joint account, a grain elevator at Dellvale, Kansas (R. 76). He had the use of the Milwaukee and Eagle Elevators in Kansas City in which he stored grain in the name of B. C. Christopher & Co. (R. 88, 142, 195, 196).

Petitioner's statement as to his intent to deliver is borne out by his actions. It should be remembered that the petitioner was a grain merchant in the grain business for thirty years, part of the time with the Rosenbaum Grain Corporation in Chicago (R. 74). He testified that on July 1, 1931, over a million and a quarter bushels of grain was delivered in Chicago in fulfillment of future contracts, and that thereafter there were large receipts of corn in Chicago every day from country points; that all this indicated to him that the large supply of corn would tend to lower the price and make it more advantageous for him to deliver corn on track at Chicago during the last three days of the month (R. 78, 79), which was permitted by the rules of the Board of Trade for Chicago July future contracts in 1931 (R. 125). However, as the evidence shows, the price sky-rocketed on July 29th, and petitioner then learned, for the first time, that the tremendous stocks which had been flowing into Chicago all during the month of July were concentrated in the hands of respondent (R. 79) and that then he tried to purchase 35,000 bushels of corn in Chicago and Iowa but was unable to do so (R. 80), nor to ship it in from Kansas, as there was not sufficient time (R. 80) and that therefore there was nothing he could do but pay the price for off-setting futures on July 31st, which price was fixed, dictated and controlled by respondent.

This leaves for our consideration in determining the intent of the petitioner, two indicia, namely, *the business*

of the petitioner, and his use or lack of use for the commodity dealt in. As these two are so connected with each other, we shall discuss them as one.

Petitioner was, and still is, a grain merchant as has already been set forth (R. 75). Grain was the only thing petitioner knew. It was his life's occupation, the means by which he earned his livelihood. Petitioner had no other business. His activities in merchandising grain consumed his entire working day.

Petitioner had sold hundreds of thousands of bushels of grain to millers and processors.

Respondent relied heavily in his Brief in the Circuit Court of Appeals on the case of *Dickson* v. *Uhlman,* reviewed on certiorari by the Supreme Court and reported in 53 Sup. Ct. 362; 288 U. S. 188 (Justices Stone, Butler and the late Justice Cardozza dissenting). However, that case is distinguished, in the words of the majority opinion itself. Of petitioner, it can not be said as this court stated in the Uhlman case, at page 195:

> "* * * Of the five defendants in the cases consolidated for trial, who were the plaintiff's largest customers at Carrolton, *two were farmers, two were clothing merchants, and one was an ice dealer. These defendants, who were not in the grain business, who had never traded on a grain exchange, and who had no facilities for handling grain,* purported to buy and sell in amounts up to 50,000 bushels in a single transaction. * * *"

In *Ehrlich* v. *Rothschild,* 11 N. E. (2d) 623; 292 Ill. App. 511, decided in 1937, a comprehensive review of the Illinois law concerning trading on the Board of Trade, is made. In that case, plaintiff, a practicing lawyer, brought suit against the defendant to recover money lost in alleged gambling transaction.

The sole question for consideration was whether sufficient evidence was produced to warrant the submission of

the case to the jury, being the identical question raised in the case at bar.

Ehrlich testified that he had bought stock and grain on the exchanges through the defendant brokers for some time prior to June, 1933, at which time defendants delivered a check to him in settlement of prior transactions. Plaintiff testified: "I told him (Rothschild) that I was through gambling for all time. 'You remember I told you a year and a half ago I never wanted to see a market as long as I live' "; that Rothschild spoke to Ehrlich some ten or twelve times during the following six weeks and wanted Ehrlich "to take a flyer," and as a result thereof, Ehrlich did make trades in both wheat and stocks.

He further testified that he "never saw any of the wheat; that he would not know what it would look like if he saw it; that he had no warehouse in which to store the wheat and didn't need any in his business as a lawyer."

The Appellate Court, in holding that the contracts were legal and that there was not sufficient evidence to warrant submitting the issues to a jury, stated at page 627:

> "Plaintiff testified that he himself did not intend to accept delivery, but he does not, anywhere in his testimony, say that Rothschild was informed by him *or that he agreed to* any such method of doing business * * *. The burden of proof was upon him. It was for him to show that *the defendants intended to enter into a gambling transaction* * * *.
>
> "Any circumstance tending to show the real intention of both parties is admissible, but it is not sufficient to present evidence tending to show the intention of only one of them. *It requires two guilty minds to make a contract in violation of the statute* * * *."

The Court continued:

> "* * * If we apply the rule stated in these cases to the facts before us, we find no testimony that either of the parties intended that the transactions should be settled by payment of differences. There is, as to

the grain (but not as to the stock) evidence that the customer could not reasonably require or conveniently use the stock or grain to the amount purchased. Previous dealings between the parties indicated purchases and deliveries with settlement concerning which no complaint was made. The deposits of margin made seem to have been ample. Most important, and controlling, the plaintiff was financially able to carry all of the transactions * * *. Upon the whole record, we are of the opinion the plaintiff (Ehrlich), failed to introduce evidence from which the jury could reasonably find that both plaintiff and defendants intended to enter into a gambling contract * * *."

In the light of these decisions, in the light of the record in the case at bar, we submit that this Court should hold that as a matter of law, petitioner was not gambling.

IV.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE "P" AND "S" SLIPS USED BY PETITIONER'S BROKER, THE MANNER AND METHOD IN WHICH THEY KEPT THEIR RECORDS AND THEIR REFERENCE TO THEIR FUTURES DEPARTMENT AS THE "OPTION DEPARTMENT" IS EVIDENCE OF AN INTENT ON THEIR PART TO GAMBLE.

In rendering the opinion in the last appeal, the Court disposed of the gambling issue by stating that inasmuch as the jury found for the respondent, the judgment of the District Court should be affirmed. It did not consider the evidence to determine whether or not it was of such substantial nature as to warrant submitting the case should have gone to the jury. It did not even refer to or comment upon the latest Illinois decision, namely, *Ehrlich* v. *Rothschild,* 11 N. E. (2d) 623; 292 Ill. App. 511, relied upon by petitioner and quoted extensively in petitioner's brief.

The only evidence respondent presented which was referred to by the Circuit Court of Appeals as inferentially indicating an intent on the part of B. C. Christopher &

Company to gamble were certain "P" and "S" slips, the method by which the ledger accounts of B. C. Christopher & Company were maintained, the method by which the ledger accounts of Lamson Brothers through whom the trades were made on the Chicago Board of Trade were kept, *and the fact that B. C. Christopher & Company referred to their future trading department as the "Option Department".*

We respectfully submit that the Circuit Court of Appeals must not be fully acquainted with the manner and method in which the grain trade is now conducted under the supervision of the Commodities Exchange Administration on supervised exchanges.

In respect to the "P" and "S" slips used by B. C. Christopher & Company, they are the usual kind used by most grain houses in the grain trade. The Court apparently adopted the respondent's argument, not supported by any evidence, that the "P" and "S" slips were highly significant of an intent to gamble on the part of B. C. Christopher & Company. The respondent in his brief had stated:

> "It is highly significant that the only invoice ever sent to a customer (by B. C. Christopher & Company) receives its name from the words "purchase and sale". That indicates that the invoice contemplated the purchase price and the sale price and billing the customer for the difference."

Not a single person in the City of Chicago, the largest grain market in the world, took the stand to testify to such a ludicrous statement.

If this is evidence of an intention on the part of a grain broker to gamble, then no legitimate grain broker in the United States would be immune from such a characterization.

In explaining the types of records employed in typical futures transactions by grain houses conducting business on

supervised exchanges under the supervision of the Commodities Exchange Administration, Mr. J. M. Mehl, Assistant Chief of the Commodities Exchange Administration, in Official Bulletin No. 151 of the United States Department of Agriculture entitled "Hedging in Grain Futures" states at page 15:

> "* * * (Immaterial portions omitted.) To resume the John Doe illustration, when the transaction is closed by buying back the future previously sold, the purchase order follows the same routine as that described for the selling order. The same procedure is followed in transmitting it from Omaha, Nebraska, to the Chicago wheat pit. *The same kind of confirmation goes forward, followed by what is known as a P & S Slip, being merely a statement of account showing both sides of a transaction together with the net result credited or charged, as the case may be, to the customer's account.*"

On page 16 of the Bulletin, there is a copy of a "P" and "S" form which, if the Court will examine it, will find is almost identical with the P & S slip employed by the B. C. Christopher & Co. (R. 198), which defendant concludes "are consistent only with the practice of settling on differences." There is absolutely no foundation to respondent's contention or the court's inference that the "P" & "S" slip indicates an intention on the part of B. C. Christopher & Co. to gamble.

As the manner and method in which B. C. Christopher & Co. and Lamson Brothers kept their records. These are kept the same as by other grain houses transacting business on the Chicago Board of Trade under the supervision of the Commodities Exchange Administration. The Court commented in its last opinion that the future ledgers account of B. C. Christopher & Co. as well as that of Lamson Brothers indicated that the various trades were closed out on the records by mere offsets and that the ledgers were not adapted to settlements by actual delivery, apparently in-

ferring that this constitutes evidence indicating an intent on the part of B. C. Christopher & Co. to gamble.

Lamson Bros. and B. C. Christopher & Co. are both members of the Chicago Board of Trade and are old established firms; all of their records are subject to the supervision of the Commodities Exchange Administration and must be kept in the manner and form prescribed by the United States Department of Agriculture. See title 7, Chapter 1, Section 6 G of the Commodities Exchange Act.

There is no evidence in the record to show that the records of B. C. Christopher & Co. or Lamson Bros. are not the usual ordinary kind employed in the grain business by grain houses who are members of the Chicago Board of Trade. In fact, one of the respondent's own witnesses, an accountant employed by Arthur Andersen & Co., accountants for some of the largest grain houses on the Chicago Board of Trade, testified on cross-examination:

> "All figures I have testified were taken from photostats of Mr. Peto's and B. C. Christopher's records. The exhibits I started from appear to be correct records. They record all transactions in the usual manner which concerns of that kind do business. They are *perfectly normal* * * *." (R. 180-181.)

It is significant to note that L. A. Fitz in charge of the Chicago office of the Commodities Exchange Administration, Paul Mehl, its Senior Economist, and Arthur W. Mayo, its Assistant Chief Accountant, were all called to testify on behalf of petitioner. If there was any merit to the contention that the records of B. C. Christopher & Co. and Lamson Bros. were not of the usual type kept in the manner prescribed by the Commodities Exchange Administration, or kept in a manner indicating an illegal purpose, this fact could have been easily brought out by the respondent.

The method adopted by B. C. Christopher & Co. and Lamson Bros. in off-setting on its books the trades of the

respective customers is identical with that set forth by Mr. Mehl in his booklet, "Hedging in Grain Futures", Official Bulletin No. 151 U. S. Department of Agriculture. As he says, simplified methods of accounting are necessary because trading on the Chicago Board of Trade runs into billions of bushels yearly. (Page 15)

> " * * * In this highly developed process of settlement, which is absolutely necessary with the large volume of business involved, it will be seen that so far as it concerns the individual customers of any one house who have bought and sold in equal amounts, the house being responsible for the net results in any event, there is no need of delaying settlement. In the end results are the same if purchases and sales of single customers are merely *off-set* one against the other and settlement made by money difference at the time.
>
> "This explanation appears somewhat lengthy, perhaps, and elementary to an unnecessary degree. *It is believed, however, that it will be of assistance to many in better understanding just what takes place and why said board of trade transactions and practices take on strange aspects only because of the methods necessary to large-scale handling and the elimination of all unnecessary detail.*"

There is no evidence upon which the respondent bases his charge, adopted by the Circuit Court of Appeals in its last opinion that "the practice (*off-setting*) followed by Lamson Bros. and B. C. Christopher * * * leads to the inevitable conclusion that it was intended that the transactions be settled on differences."

The extent to which the Circuit Court of Appeals apparently adopted the fallacious arguments and inferences of the respondent is nowhere better illustrated than in that portion of its opinion wherein it stated at page 251:

> "The details of the transactions between plaintiff and his broker over a long course of time discloses that his grain deals were carried on the records of the broker's 'Option Department' * * *."

In his brief, respondent had argued that the futures records of B. C. Christopher & Company were kept in the "option department" and that the ledgers of petitioner's personal trades in futures were kept thereon. The respondent then concluded that options in grains are expressly declared illegal under the Illinois Statute.

But the true fact with reference to the word "options" is as stated in *Nash-Wright Co.* v. *Wright,* 156 Ill. App. 243, at 248, 249:

> "* * * But as appears * * * the word 'option' is used in two different senses. It is used among the members of the Board of Trade usually coupled with the name of the month in which grain is deliverable *as a trade name,* and when so used, the sole option in the matter is the option which the seller has to deliver the grain purchased at any time during such specified month. * * *."

See also 83 A. L. R. 563 to the same effect.

It is apparent, therefore, that the word "options" is used in the grain trade merely as a synonym for "futures". It seems fantastic to say the least that B. C. Christopher & Company would maintain an illegal gambling department in its business and openly label it as such.

It is indeed difficult to understand how the Court came to the conclusion that it did as shown by its comments in respect to petitioner's financial ability to carry his trades and its remarks to the effect that petitioner "had no elevator facilities of his own * * *." Petitioner personally owned and operated a grain elevator at Dellvale, Kansas, at the time of these transactions (R. 76). This appeared in petitioner's brief a number of times. In fact, respondent at no time disputed it. In addition, petitioner actually operated a grain elevator for B. C. Christopher & Co. in his joint account, which fact is also not disputed. Notwithstanding the Circuit Court of Appeals states that petitioner had no elevator facilities (page 252 of opinion).

The Court further stated that petitioner was 50,000 bushels short of July corn which would have necessitated an expenditure of $31,006.25. The amount of the expenditure would be correct if the premise was a fact. However, petitioner had previously closed out 15,000 bushels of Chicago July corn and was only short 35,000 bushels (R. 76, 81; Ex. 149, 153; R. 82-84). This is also not disputed. Therefore, even if petitioner had to pay cash for every bushel of corn which he sold, he would require only $21,500.00. The trades in wheat referred to by the Court showed that he had a credit of approximately $1700.00. The evidence showed that petitioner owned his own home clear, title to which was in himself and his wife, valued at $10,000.00 (R. 85). He had a credit on the books of B. C. Christopher & Co. of $8,319.43 at the time of his last sale of July 1931 corn on May 12, 1931 (R. 152). He had $4500.00 in cash in the First National Bank of Kansas City and $3,000.00 in stocks and bonds. This alone totals $23,500.00. In addition, he owned a membership on the Kansas City Board of Trade valued at $12,000.00, to which membership, although in his wife's name, petitioner had the full beneficial ownership and used the same constantly in his business (R. 85). In addition, the 35,000 bushels of corn had a loan value of approximately $15,000.00 for which petitioner apparently is not given any credit.

As set forth in the case of *Riordon* v. *McCabe,* 173 N. E. 660, 341 Ill. 506, the grain dealt in had a loan value equal to 75% of the market price. Not only was petitioner financially able to carry the 35,000 bushels of July corn which he sold short but was financially able to carry several times that amount.

The fact is, as shown by the record in this case, when respondent applied the "squeeze" during the last three days of his corner and compelled petitioner to pay the abnormally high price of 72½¢ per bushel, petitioner did not default but promptly paid.

The Court quoted from respondent's brief that petitioner had made apparent contradictions in his testimony as to *whether* he *owned* corn at the time of his transactions and whether he intended to deliver such specific corn. In the first place, even if this were true as showing an intent on petitioner's part not to deliver, it would not mean that B. C. Christopher & Company entered into an illegal agreement with petitioner.

In the second place, it is immaterial whether petitioner owned any corn at the time of his trades or whether he intended to deliver that specific corn. As stated in *Clews* v. *Jamieson*, 21 Sup. Ct. 845, 182 U. S. 461, at 493 :

> "* * * The fact that at the time of the sale the complainants did not own any of the stock cannot support the presumption, because it is perfectly valid to make such a sale, and an illegal intent accompanying the performance of a perfectly legal act cannot be presumed. * * *."

Petitioner earnestly asks the Court to read the record with regard to the so-called conflicting testimony (R. 85-99). The attorney for the respondent was so determined that petitioner should not be given an opportunity to explain statements made years before at the former trial that even the District Court had to intervene (R. 86-87).

Conclusion.

It is therefore respectfully submitted that the Circuit Court of Appeals has disregarded the Illinois law as well as the law of other circuits in affirming the judgment of the District Court and its judgment should be reversed; and to that end a writ of certiorari should be granted.

J. Robert Cohler,
Attorney for Petitioner.